UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IGT GLOBAL SOLUTIONS Employer and INTERNATIONAL AND BROTHERHOOD OF TEAMSTERS LOCAL 251 Petitioner	CASE NO. 01-RC-176909

EMPLOYER'S BRIEF TO THE NATIONAL LABOR RELATIONS BOARD ON REVIEW OF REGIONAL DIRECTOR'S DECISION

INTRODUCTION

The National Labor Relations Board ("Board" or "NLRB"), by Order dated 21 December 2016 granted the Request for Review of Petitioner, Teamsters Local 251 ("Union" or "Teamsters"), on two issues: (1) whether the asserted failure of the Employer to timely serve its Statement of Position on the Union, precluded the taking of evidence regarding the appropriate scope of the bargaining unit (citing Section 102.66(d) of the Board's Rules and Regulations) and (2) whether the Regional Director's decision finding the petitioned for unit inappropriate was correct.

As discussed more fully below, the Regional Director did not err in taking evidence to fulfill his (and the Board's) statutory obligations, and the

evidence adduced in the hearing fully supports his decision. Notwithstanding the Employer's disagreement with *Specialty Healthcare* in principle and its random and conclusory applications[1] by the Board, the Regional Director here correctly found the countervailing evidence cited by the Union to be insufficient to alter his decision, which fully complied with the Board's *Specialty Healthcare* decision and its progeny. 357 NLRB 934 (2011), *enf'd sub nom., Kindred Nursing Centers East v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

EVIDENTIARY BACKGROUND

In 2015, IGT was acquired by GTECH. Both entities had operations in Rhode Island. Operations were consolidated at the West Greenwich facility and six lottery Field Services Technicians (I, II, or III) ("FST") and three Gaming Services Technicians (I, II, or III) ("GST") were based at this facility under a common program and set of benefits, common company

[1] The Employer fully endorses the dissent of Member Miscimarra as expressed in footnote 1 of the Order granting review in this case (Dec. 21, 2016), and in other decisions as the propriety of the Board's *Specialty Healthcare* decision, contending that the traditional community of interest standards should be applied. Indeed, although more observed in the breach than the following, *Specialty Healthcare* itself *requires the Board* to consider these factors assessing the community of interest, as its "first step." 357 NLRB at 944-45; *Williams-Sonoma Direct*, 365NLRB No. 13, n. 1 (2017). *See, e.g., Constellation Brands vs. NLRB*, F.3d __, 2016 WL 6832936 *4, *6 (2d Cir. Nov. 21, 2016). Similarly, the Employer fully adopts and endorses Member Miscimarra's dissenting views regarding the Board's new election Rules, particularly his emphasis and recognition that the Board (and its Regional Directors) have a *statutory duty* to fully investigate, including, if needed, an evidentiary hearing, on whether the petitioned for unit is an appropriate unit for the purposes of creating an environment in which productive collective bargaining can occur and stable labor relations can exist. *Williams-Sonoma Direct*, 365NLRB No. 13, n. 1 (2017); *Brunswick Bowling Products*, 364 NLRB No. 96, slip op. at 3-6 (2016).

policies and job evaluation system and a common supervisor. The combined entities operate under the trade name IGT, with IGT Global Solutions (the "Employer" or "IGT") being the local employer. The service technicians immediately following the merger began cross training on the equipment maintained by one or the other. Pet. Ex. 5, 7. Both the FSTs and GSTs use same or similar tools to repair or perform maintenance on the specified customer's electronic gaming equipment (R. 88). The FSTs generally serviced lottery terminals and scratch ticket vending machines while the GSTs serviced slot machines and performed other casino electronic game repair and maintenance. Cross-training on the various equipment has been initiated shortly after the merger, which continues to be provided under Ms. Beth Lyon's supervision. The cross-training is designed to equip all technicians to perform all tasks and this training has involved FSTs from both Connecticut and Rhode Island and well as the GSTs (R. 47-48; Pet. Exs. 5, 7). The Connecticut FSTs do not work on lottery machines because IGT does not have the contract with that state to do so (R. 77). Both the FST and GST classification levels (I, II, III) depends on the level of training and experience gained – not all are equally skilled. See, e.g., Pet. Ex. 6; Emp. Ex. 1. Indeed, one of the FSTs is already basically proficient in the work of the GSTs (R. 21, 61, 96). IGT's intent is to be able to fully and efficiently

utilize all these technicians in RI and CT in performing customer equipment maintenance or repairs, regardless of the exact type of machine involved.

Ms. Lyon began supervising the 11 field and gaming service technicians from the West Greenwich, RI facility in or about April, 2016. In addition to further advancing cross-training, the Regional Director noted specific examples where several GSTs have been assigned and have performed work formally handled by the FSTs, both at customer locations and at the casinos. Further, as part of IGT's accomplished integration steps as of the hearing in this matter, FSTs and GSTs both deliver equipment to the casinos, without regard to whether it is for a slot machine or a lottery terminal. FSTs in Rhode Island also have made necessary delivery of parts to the Connecticut FSTs. While Ms. Lyon was still a very new supervisor at the time of the hearing, integration of the workforce, as well as IGT's expectations, were well underway and in effect prior to the hearing. Ms. Lyon's anticipated further functional integration within a couple of months following the hearing (R. 51-52).

ARGUMENT AND AUTHORITIES

1. ***The Asserted Violation of 102.66 of the Board's Rules.***

First, the Union's naked claim of untimely receipt of the Employer's Statement of Position is not a sufficient basis for the Board to even consider

the invocation of 102.66(d) of its Rules. The Board's preclusive rule in this regard, if not tempered, runs afoul of the fundamental due process rights of a party in an administrative proceeding.

Basic constitutional protections of the Due Process Clause must be honored when a federal agency adjudicates, holds trials or hearings and generally makes determinations which affects the rights of individuals. *See, e.g., Hannah v. Larche*, 363 U.S. (1960); *NLRB v. Mackay Radio & Tele. Co.*, 304 U.S. 333 (1938)

> [A quasi-judicial function] is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such.

The Board's statutory obligation under Section 9 of the Act is specific and direct—it is to investigate and determine *based upon the evidence adduced at* a *hearing*, the issue(s) presented—including, whether the proposed unit is one that is appropriate for meaningful collective bargaining and stable labor relations, based upon the traditional community of interest standards. *See, e.g., Allied Chem. Workers v. Pittsburg Plate Glass,* 404 U.S. 157, 173 (1971) (citing *Pittsburg Plate Glass v. NLRB,* 313 U.S. 146, 165 (1941)); *Colgate-Palmolive Peet Co. v. NLRB,* 338 U.S. 355, 362 (1949); *Jones & Laughlin Steel Corp., 331 U.S. 416, 422-23 (1947).* Indeed, the purpose of the investigation and hearing is to assure that a full and adequate evidentiary

record is made, upon which an informed, unbiased and impartial decision can be made, in keeping with the statute's twin mandates of freedom of employee choice and determining an appropriate bargaining unit which is conducive to establishing and maintaining a stable collective bargaining relationship. *See, e.g., North Manchester Foundry,* 328 NLRB 372, 372-73 (1999); *Kalamazoo Paper Box Co.*, 136 NLRB 134, 137 (1962)("[I]t is the mandate of Congress that this Board 'shall decide in each case…the unit appropriate for the purpose of collective bargaining.' In performing this function, the Board must maintain the two-fold objective of insuring to employees their rights…and of fostering industrial peace and stability through collective bargaining….[E]ach unit determination…(in order to effectuate the Act's purposes), must have a direct relevancy to the circumstances within which collective bargaining is to take place"); *Fraser Engineering,* 359 NLRB 681, n.2 (2013)[2].

Further, as the Board's rules also provide in 102.66(b), and, as *the Act requires,* the Board (and its Regional Directors by delegation) must take all necessary steps to create an adequate evidentiary record to determine the

[2] The Board's statutory obligation is to impartially review and evaluate the factual evidence and *explain why* the particular community of interest factors relied upon are important and others are not. A rot recitation of the factors, and a conclusionary finding is not sufficient. *See Constellation Brands*, 2016 WL 6832936 *7; *Le Moyne-Owen College v. NLRB*, 357 F.2d 55-61 (D.C. Cir. 2004); *Sundor Brands v. NLRB*, 168 F.3d 515, 519-20 9D.C. Cir. 1999).

fundamental issues presented, such as the appropriateness of the petitioner's proposed unit. *See*, 29 U.S.C. §159(a), (b)(c); *Brunswick Bowling Products*, 364 NLRB No. 96 (2016) (majority holds taking of evidence appropriate notwithstanding admitted failure of party to timely supply Statement of Position; holding only that admission of statement itself was error). Indeed, the Board recognized that despite its rule, there is a statutory duty, which is not limited by an asserted failure to provide a Statement of Position on a timely basis, for a Regional Director to exercise his discretion to admit evidence concerning the issues involved, such as the appropriateness of the petitioned for unit. Rule 102.66(b); 79 Fed. Reg. 74307, 74399, 74484 (December 15, 2014).

As the Board majority observed in *Brunswick*, 364 NLRB at slip op. 2, 3. "[T]he preclusion provision [of 102.66(d)] … does not affect the validity of [the Regional Director's] conclusion … The rule does not, however, preclude any other party from raising an issue, *nor does it preclude the regional director from addressing an issue … . Once a petition is filed, the regional director is charged with the responsibility to investigate …*. These are the regional director's [and Board's] statutory responsibilities under … the Act; the amended rules did not and could not–change them." In fact, the Rule in this regard is counterproductive and an impediment to the

Board (and its Regional Directors) in fulfilling their statutory obligations. *See Williams Sonoma*, 365 NLRB No. 13 (2017). In denying review in the case, the Board upheld the Regional Director's exclusion of employer evidence because of a failure to comply with 102.66(d). Myopically, the Board chose not to consider the effect on its statutory obligations. In his decision, the Regional Director, acknowledging the Board's statutory obligation to determine if a proposed unit is appropriate, held that even absent opposition, the Board "must nonetheless assess whether the petitioned for unit is an appropriate unit." *Id*. slip op. at 2. Holding that the limited evidence before him as presented by the union was inadequate to establish the appropriateness of the proposed unit, he dismissed the petition. *Id.* slip op. at 2-3.

2. ***The Regional Director's Decision is Consistent with Board's Precedent.***

The Regional Director's decision correctly applied *Specialty Healthcare*, and found that the petitioned for unit was a fractured unit. *See Bergdorf-Goodman*, 361 NLRB No. 11, slip op. 3, 4 (2014); *Fraser Engineering*, 359 NLRB No. 80, slip. op. 1 (2013); *Odwalla, Inc.*, 357 NLRB 1608, 1612-13 (2011). Here, not all technician classified employees were included and not all employees under common supervision were

included in the petitioned for unit[3]; further, both GSTs and FSTs work out of the same facility, except two FSTs who work remotely in Connecticut, but they along with their Rhode Island brethren share the same benefits, job evaluation program and supervision and possess similar skills to the Rhode Island FSTs.[4] As the Regional Director observed, full integration had not been achieved as of the date of the hearing but concrete steps and actions to accomplish this integration were well under way and training for this purpose and actual cross utilization had occurred.

The Union's position simply ignores the Employer's primary business, which is repairing customer gaming equipment and which encompasses both FSTs and GSTs. The Union simply seeks to focus on the "different" skill levels each group possesses while it ignores that those differences in skill levels also exist *among* the FSTs and *among* GSTs.

The Union's thrust is to elevate the nature of equipment to be repaired and a hypothetical generic, skill level to assert its proposed unit is not a

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[3] The Union asserts there are "different" departments based upon some otherwise unexplained coding. Union Request for Review, p. 5. At best, the coding may reference billing designations, but they certainly do not affect IGT's organizational structure and common supervision of the technicians (Emp. Ex. 1; R. 17-18).

[4] See *Terex*, 360 NLRB No. 138 (2014) (denying review where Regional Director found exclusion of similarly classified employees working in a separated area (not an employer established department) created a fractured unit; *Bergdorf- Goodman*, 361 NLRB at slip op. 1, 3, 4; *Trane Co*. 339 NLRB 866, 868 (2003) (exclusion of remote, similarly classified employees under common supervision sufficient to overcome single plant presumption).

fractured one.[5] The Union's argument simply ignores the fact that IGT's business is to service its customers' gaming machines, whether they are lottery terminals, vending machines or slot machines, when they are in need of maintenance and repair. The FSTs and GSTs fulfill this role, and there has been and continues to be cross training[6] and cross utilization between the two previously separate groups which existed prior to the merger. When coupled with the common supervision, common benefits and job evaluation system, there is no basis to create a fractured unit. *See, e.g. Bergdorf–Goodman*, 361 NLRB at slip op. 3, 4; *Odwalla*, 357 NLRB at 1612-13; *Specialty Healthcare,* 357 NLRB at 942 n. 19. Indeed, the employer's structuring and intended utilization of its workforce is a most important consideration in the proper analysis of the appropriateness of the proposed unit. *Bergdorf-Goodman*, 361 NLRB No. 11, slip op. at 3; *Gustave Fisher, Inc.*, 256 NLRB 1069 n. 5(1981) (citing *International Paper Co.*, 96 NLRB 295, 298 n. 7 (1951)); *Birdsall, Inc.,* 268 NLRB 186, 190 (1982); *Kalamazoo Paper Box*, 136 NLRB at 137. *See also*, *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262, 1270 n. 9 (D. C. Cir. 1991). The Union here

[5] To the extent the Union relies on the existence of different classifications, that position has been rejected many times. *See, e.g. Rayonier, Inc.* v. *NLRB*, 378 F. 2d 187 (5th Cir. 1967); *Kalamazoo Paper Box Co.*, 136 NLRB 134 (1961). Indeed, the testimony establishes that the same tools are used by both and the distinction is in the equipment to be installed/repaired in a particular type of machine.

[6] See, e.g., Pet. Exs. 5 & 7 (training courses occurring in March, April and May of 2016).

simply seeks to use *Specialty Healthcare* not to justify an appropriate unit but in an attempt to prevent the Employer from completing its cross training and cross utilization of its technician workforce.

Taken to its logical conclusion, the Union's argument is that an appropriate unit, for example, of automotive service technicians in a single shop under common supervision with common benefits can be fragmented appropriately because the technician performing front end alignments uses different specialized tools and has different skills than the technician who tunes-up engines (using different, distinct diagnostic machines) or the technician who evaluates and repairs the air conditioning system, who also utilizes different specialized tools and skills.

This position has been rejected many times and *Specialty Healthcare* expressly did not change existing law in that regard. The Board must include in its evaluation whether, *in distinction* from other, non-included, employees, a legally sufficient separate community of interests exists. *See, e.g., Constellation Brands*, 2016 WL 6832936 at *4, *6; *Wheeling Island Gaming*, 355 NLRB 637(2010) (poker dealers not separate unit from other dealers where all dealers operate wagering games for customers and have similar wages and common benefits); *Seaboard Marine Ltd.*, 327 NLRB 556 (1999); *Newton Wellesley Hosp.*, 250 NLRB 409, 411-412 (1980).

Further, the Board has long recognized that operational changes by an employer can impact the appropriateness of a unit, whether preexisting or proposed. *See, e.g., Armco*, 312 NLRB 257 (1993); *Rock-Tenn*, 274 NLRB 772, 773 (1985); *Kansas City Coors*, 271 NLRB 1388 (1984) (employer's construction of new facility underway and its prospective consolidation plans renders union's proposed unit, excluding one of pre-existing facilities to be consolidated operationally at the new facility, inappropriate); *M.B. Kahn Constr. Co.*, 210 NLRB 1050 (1974) (estimated end of project requires dismissal of petition); *Gerlach Meat Co*., 192 NLRB 559 (1971)(employer's expansion plans contemplated to occur within a year is a realistic measure to judge the substantiality of existing workforce); *Douglas Mtr. Corp.*, 128 NLRB 307 (1960) (planned elimination of manufacturing operation and restructuring into a distribution center with 75% fewer employees warrants dismissal of the petition); *Freuhauf Trailer*, 87 NLRB 589, 591 (1949) (employer's changes in operations creates two new, separate units rather than historical single bargaining unit).

So it is here. Following the merger of IGT and GTECH a little over a year ago, the Employer has consolidated its local operations in one facility, cross-trained the FST and GST employees and taken concrete steps to functionally integrate the FSTs and GSTs, who share common supervision,

common benefits and job evaluation system. IGT is continuing these steps to upgrade the skills of the technicians including cross training on the equipment to be serviced and to fully integrate its operations. It is clear under these facts, the Union has simply failed to justify any departure from the Board's (and statute's) recognition that a single plant unit is presumptively appropriate, including any remote but connected, commonly supervised operations, 29 U.S.C. Section 159(b); *See NLRB v. Campbell Sons' Corp.,* 407 F.2d 969, 976, 979 (4th Cir. 1969); *Terex,* 360 NLRB No. 138 (2014); *Trane Co*., 339 NLRB at 868, *AVI Foodsystems, Inc.,* 328 NLRB 426, 429 (1999); *Airco, Inc.*, 273 NLRB 348, 349 (1984); *Kent Plastics Corp*., 183 NLRB 612 (1970). Indeed, the burden is on the party seeking to overcome the single plant presumption to demonstrate that the interests of those not included are so *disparate* they cannot be represented in the same unit. *Constellation Brands*, 2016 WL 6832936 *7; *AVI, 328* NLRB at 426, 429 (and cases cited); *Airco,* 273 NLRB at 438-39. The Regional Director's decision is well supported by the record and Board precedent. The Board should adopt and uphold the Regional Director's decision, expressly rejecting fragmentation as urged by the Union.[7]

[7] Any approval of the Union's proposed fragmented unit under the facts of this case, would be based upon nothing more than the extent of organization in contravention of Section 9(c) (5) of the Act.

In sum, the Union's effort to "plumb pick" the record in this case to highlight differences in the ability of particular individual technicians to repair or replace particular types of customer gaming equipment, needed to fulfill customer orders, ignores *all* the other factors by which a unit appropriate for bargaining is to be judged. IGT has undertaken to cross-train and more fully integrate the workforce to make it more efficient and to effectively serve its customers' needs – which is the job function of the both technicians. The Regional Director's decision is correct and should be adopted by the Board.

Wherefore the Employer prays that on review, the Board adopt and affirm the Regional Director's decision in all regards.

Dated: January 17, 2017

Respectfully submitted,

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/s/ Theo Gould

PROOF OF SERVICE

I am a resident of the State of New York, over the age of eighteen years, and not a party to the within action. My business address is 990 Third Avenue, New York, New York 10022. On January 17, 2017, I served the within document(s), Brief of Employer on Review of Regional Director's Decision:

☒ by efiling the document(s) listed above through the NLRB's website at www.nlrb.gov; and

☒ by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail to: Counsel for the Union, 121 Brightridge Ave., East Providence, RI 02914; and

☒ by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail to: John J. Walsh, Jr., Regional Director, NLRB, Region 1, 10 Causeway St. #601, Boston, MA 02222-1001.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 17, 2017, at New York, New York.

/s/ Theo Gould

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